

No. 15112

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

RAYMOND PERCIBELL,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLANT'S OPENING BRIEF.

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No. 15119
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RAYMOND PERCIFIELD,

Defendant and Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

Appeal From the United States District Court for the
District of Nevada.

APPELLANT'S OPENING BRIEF.

**Statement of the Pleadings and Facts Disclosing Basis
for This Court's Jurisdiction.**

The Defendant and Appellant was accused in the United States District Court for the District of Nevada in two counts of an Amended Information charging him with violation of Section 145(b) of the Internal Revenue Code of 1939 (Title 26, United States Code, Sec. 145(b)). The Amended Information is set forth commencing on page 4 of the Transcript of the Record. To the Information the Defendant and Appellant pleaded "not guilty" and trial

was had before a jury. On the 21st day of February, 1956, the jury returned a verdict of "guilty as to each count" [Tr. R. p. 11]. Thereafter, a Motion for New Trial was filed [Tr. R. pp. 11-14], and, thereafter, on the 12th day of March, 1956, the trial court made an order denying the Motion for New Trial [Tr. R. p. 15]. On the 16th day of March, 1956, the Defendant and Appellant appeared before the trial court and the court thereupon passed sentence upon the Defendant and Appellant [Tr. R. pp. 16-17]. On the 20th day of March, 1956, the Defendant and Appellant herein filed his Notice of Appeal [Tr. R. pp. 19-21], and on May 1, 1956, the Defendant and Appellant herein filed a concise statement of points relied upon [Tr. R. pp. 360-361].

Jurisdiction is conferred upon this court to review the judgment of conviction by provisions of Title 18, United States Code, Section 3772, and Title 18, United States Code Rules 37 and 39, respectively.

Concise Statement of the Case.

In support of the Government's case for fraud, the Government's proof was presented under two theories, namely, the net worth theory and the bank deposit theory [Tr. p. 255]. The Defendant and Appellant maintained books and records [Exs. 30-31], which the Government inferentially charged were inaccurate in that they did not reveal certain income which the Government contended the Defendant and Appellant had during the two taxable years in question.

As chief grounds for reversal of the judgment of conviction, the Defendant and Appellant urges the following points:

1. The court erroneously instructed the jury and failed to adequately instruct the jury as to the law of the case, and the instructions given to the jury, taken all together, gave an incomplete and erroneous statement of the law of the case which constituted prejudicial error.

2. The court erred in admitting in evidence an affidavit of the Defendant referred to as "Government's Exhibit 32" [Tr. R. p. 209] over Defendant's objections thereto, and without corroboration it cannot be the basis of the judgment.

For purpose of clarity, each of the foregoing points will be expressly stated and discussed in the Argument section of Defendant and Appellant's brief.

ARGUMENT.

I.

The Court Erroneously Instructed the Jury and Also Failed to Adequately Instruct the Jury as to the Law of the Case, and the Instructions Given to the Jury, Taken All Together, Gave an Incomplete and Erroneous Statement of the Law of the Case Which Constituted Prejudicial Error.

A. The Court's Instructions Were Inadequate as to "Reasonable Doubt."

The court gave six instructions relating to reasonable doubt. These instructions were numbered, as follows: No. 7 [Tr. R. p. 326]; No. 10 [Tr. R. p. 328]; No. 11 [Tr. R. p. 328]; No. 12 [Tr. R. p. 328]; and No. 13 [Tr. R. p. 329].

While the trial court made frequent use of the term "reasonable doubt", in only one of the instructions, to-wit, No. 12 [Tr. R. p. 328], did it attempt to define "reasonable doubt". In Instruction 12, the court used language which the Defendant and Appellant respectfully submits is confusing and misleading and is intrinsically erroneous. The objectionable language is found in the following portions of the instruction: "It is not mere possible doubt but it is such doubt as would govern or control a person in the more weighty affairs of life" and further "doubt to be reasonable must be actual and substantial not merely possibility or speculation."

The vice of this instruction rests in the failure of the court to cast the subject matter in a form readily understandable by a jury. It is respectfully submitted that reasonable doubt is not such doubt as would govern or control a person in the more weighty affairs of life but

rather the kind of doubt that would make a person hesitate to act. It is the type of doubt which in the ordinary conduct of life prevents a person from acting or doing some affirmative act because of the doubt which he feels with reference to its wisdom or outcome. Here it is the kind of doubt which should deter a juror from acting, *i. e.*, from returning a verdict of "guilty". This view is supported by a decision of the United States Supreme Court in the case of *Holland v. U. S. A.*, 348 U. S. 121, 75 Sup. Ct. 127, in which Mr. Justice Clark, speaking for the court said

"Even more insistent is the petitioner's attack not made below on the charge of the trial judge as to reasonable doubt. He defined it as 'the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon.' We think this section of the charge should have been in the terms of the kind of doubt that would make a person hesitate to act, see *Bishop v. U. S.*, 107 Fed. (2) 297, 303, rather than the kind on which he would be willing to act."

While in the *Holland* case the court did not find this error to be reversible error in the light of the other instructions therein given, it is respectfully submitted that no other curative instructions are present in this case. This error, coupled with the other error in the record of this case, constitutes, we think, reversible error.

A further serious problem is presented by the use of the following language in Instruction No. 12, namely: "Doubt to be reasonable must be actual and substantial not mere possibility or speculation". The term "actual and substantial" in itself negates and wholly neutralizes the basic concept of "reasonable doubt". If, after con-

sidering all of the evidence the jurors hold an actual and substantial belief either as to the truth of the charges in the Information or an actual and substantial disbelief, then it is respectfully submitted the state of the jurors' minds admits of no possible reasonable doubt. Reasonable doubt is a state of mind whereby the very existence of uncertainty in a juror's mind would compel him to say, "I do not feel an abiding conviction to a moral certainty of the truth of the charge". The requirement as contained in Instruction No. 12 that the jurors in order to have a reasonable doubt within the meaning of the law must have "an actual and substantial doubt" goes beyond the definitions which have heretofore been judicially approved of the term "reasonable doubt". In the case of *Wilson v. United States*, 232 U. S. 563, 34 Sup. Ct. 347, 728 L. Ed. 728, the Supreme Court approved an instruction which read in part "If you are in the frame of mind where, if it was a matter of importance to you in your own affairs, away from here you would pause and hesitate before acting, then you have a reasonable doubt". To such an instruction the Appellant was entitled in the trial court. The use of the language "Doubt to be reasonable must be actual and substantial not merely possibility or speculation" changes the substance of doubt from one of inherent uncertainty and hesitation which it is, in contemplation of law, to one of certainty and substance which it is not.

B. The Court's Instruction Was Inadequate as to the Effect of Use of "Character Witnesses."

The court gave one instruction only with reference to character witnesses. This was Instruction No. 49 [Clk. Tr. p. 346]. The Defendant did not take the stand in his own defense. He did offer, however, several character

witnesses, namely, Joyce Proctor [Tr. R. pp. 182-186], William Smith [Tr. R. pp. 232-237], William Elam [Tr. R. pp. 238-240], and Hugh Coldwell [Tr. R. pp. 241-246]. The effect of the character witnesses, therefore, was vital so far as the Defendant's case was concerned. The Appellant has no objection to the court's Instruction No. 49 as far as it went. It omitted, however, one element which Appellant respectfully urges rendered it insufficient and fatally defective. This element is a statement of the legal effect of character witnesses. The missing element is a statement of the legal proposition that evidence of good character of an accused may in and by itself alone be enough to produce in the minds of the jury reasonable doubt as to the Defendant's guilt. Quoting from the Supreme Court of the United States in the case of *Edgington v. United States*, 164 U. S. 361, 17 Sup. Ct. 72, we find the following language: "The circumstances may be such that an established reputation for good character if it is relevant to the issue would alone create a reasonable doubt although without it the other evidence would be convincing." While Instruction No. 49 properly instructs the jury as far as it goes, in view of the fact that the Defendant did not take the stand in his own behalf and relied upon his presumption of innocence, a further instruction embodying the missing element was necessary to adequately instruct the jury on the subject of character witnesses. The court in order to have adequately instructed the jury on the subject of character witnesses should have instructed them that evidence of good character of the Defendant in itself may produce reasonable doubt. A careful reading of all of the instructions given in this case fails to supply this vital missing element.

While Instruction No. 49 in its present form was submitted by trial counsel for the Defendant, it is respectfully

submitted that the missing element should have been given to the jury by the court whether included in the Defendant's suggested instructions or not. In a criminal case it is the duty of the court to instruct the jury on all essential questions of law whether requested or not. *Morris v. United States*, 156 F. 2d 525, *Miller v. United States*, 120 F. 2d 968. It is, therefore, respectfully submitted that the learned trial court failed to adequately instruct the jury on the question of character evidence.

C. The Court Refused to Give a Requested "Cautionary Instruction" to the Jury.

The Defendant requested that the court given an instruction designated as "Defendant's C" [Tr. R. pp. 7-8]. The trial court refused to give this instruction and in place thereof gave two instructions designated as Instructions No. 26 and 27 [Tr. R. pp. 336-338]. The Defendant objected and took appropriate exception to the court's refusal to give his Instruction C and to Instructions 26 and 27, which the court did give to the jury [Tr. R. pp. 354-356]. The first half of the Defendant's requested Instruction C is in the nature of a cautionary instruction. That a cautionary instruction is necessary and desirable in cases in which the Government seeks to prove a tax fraud by the net worth theory is found in the language of the Supreme Court in the case of *Holland v. U. S. A.*, 348 U. S. 121, 75 Sup. Ct. 127.

In that case, Mr. Justice Clark speaking for a unanimous court used the following language which is applicable to this case and which affords substantial precedent for the defendant's requested cautionary charge:

"While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. The

complexity of the problem is such that it cannot be met merely by the application of general rules, *cf.*, *Universal Camera Corp. v. Labor Board*, 340 U. S. 474, 489. A trial court should approach these cases in the full realization that the taxpayer may be ensnared in a system which, although difficult for the prosecution to utilize is equally hard for the Defendant to refute. Charges should be especially clear including, in addition to the formal instructions a summary of the nature of the net worth method, the assumptions upon which it rests, and the inferences applicable both for and against the accused. The appellate court should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

In this case, the Defendant requested a cautionary instruction which with minor changes embodied the actual language of the Supreme Court opinion. For purpose of continuity, the court's attention is now called to the language of the Defendant's requested cautionary Instruction No. C [Tr. R. pp. 7-8]. The Defendant requested that the court instruct the jury, as follows:

"Ladies and Gentlemen of the Jury: It is my duty to say to you that the conclusion has been reached from experience that while the dangers which necessarily accompany the use of the net worth theory do not foreclose its use, they do require on the part of the court and jury the exercise of great care and restraint, the complexity of the problem being such that it cannot be met by the application of general rules. It is my duty to approach the net worth cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is especially hard for the de-

fendant to refute; and therefore it is my duty to give especially clear instructions upon the net worth theory and to include a summary of the net worth method, the assumptions upon which it rests, and the inferences available both for and against the accused”

The Supreme Court in the *Holland* case indicates that where net worth method is used the complexity of the problems cannot be met by mere application of the general rules. Nowhere throughout the entire body of instructions given by the court do we find any statement substantially to the effect that the taxpayer may be ensnared in a system which though difficult for the prosecution to utilize is equally hard for the defendant to refute. Such a cautionary instruction, we think, is directly related to the problem of reasonable doubt. Without such a cautionary instruction, a necessary and comprehensive facet of the over-all problem of reasonable doubt and the adequacy of instructions relating thereto is missing. This is especially true of a situation such as is present in this case. Here the defendant did not take the stand in his own defense. Whether or not he possessed sufficient education or training to dispel the conclusions of the Government's trained experts in the field of accounting is, of course, speculative, but the fact that he did not take the stand is all the more compelling a reason, we submit, why the jury should have been given the cautionary instruction requested. The Supreme Court directed its observation in the *Holland* case to trial courts and especially admonished them to frame their jury instructions with special clarity. The instructions to the jury in this case do not meet the standards of clarity nor is there included the special admonition above referred to in net worth cases.

D. The Court's Instructions Regarding the "Net Worth Method" Were Insufficient and Inaccurate.

The court instructed the jury with reference to the net worth method in Instructions No. 26 and 27 [Tr. R. pp. 336-338]. The court rejected, however, the Defendant's requested instruction covering the net worth theory as it was embodied in requested Jury Instruction No. C [Tr. R. pp. 7-8]. The vice of the instructions as given by the court lies in the failure of the court to clearly instruct the jury as to both the inferences available for the Government and inferences available for the accused which may be drawn from application of the net worth theory. That the court must instruct the jury as to both sets of inferences has been enunciated by the Supreme Court in the *Holland* case *supra*. Both the last sentence of the Defendant's requested Instruction C [Tr. R. p. 8] and the last sentence of Instruction No. 26 as given by the court [Tr. R. p. 337], recognize that if at the end of a year a person owns more property than he had at the beginning of the year it goes without saying that he got it from some place. The Defendant's instruction, however, is careful to point out that while the difference could be taxable income, there may be sources from which the increased net worth are not taxable and would, therefore, not be considered taxable income.

The last sentence of the court's Instruction No. 26 unequivocally states that if a man owns more property than he had at the beginning of the year, it may be inferred that this was part of his taxable income. Contrasted to this unequivocal statement is the other available inference presented to the jury, namely, that the increase in net worth may not be part of his taxable income. This inference was hinted at only by the language of the in-

struction, "and if it is shown that he did not get it by gift or inheritance or loan". Even this inferential type of instruction fails to include a very common source of nontaxable increase of net worth. The appreciation of the market value of property held or owned by a taxpayer at the end of a year as compared to its value at the start of a year will reflect an increase in net worth of the taxpayer. Such increase in net worth, however, is not taxable income unless, of course, the property has been sold and a profit realized by the taxpayer on the sale during the taxable year.

It is respectfully submitted that in instructing the jury on the net worth theory, the Defendant is entitled to instructions covering two phases of the subject, to-wit, first, to an instruction clearly stating that not all increases in net worth constitute taxable income, and, second, to an instruction enumerating each basic category of acquisition of wealth or property which is not in itself taxable income. It is respectfully submitted that the instructions as given by the court failed in each of these particulars.

The danger present in the form of the instructions on the net worth theory as given by the court is further pointed out by Instruction No. 27. The Defendant excepted to this instruction also [Tr. R. p. 356]. The vice of this instruction is the fact that it points to one possible inference only and that in the Government's favor rather than in the two inferences. It omits any reference to an inference which may be drawn in favor of the Defendant. The last sentence of Instruction No. 27 indicates that if the Defendant had a net worth in particular years and also had a business or calling of a lucrative nature, that the income is then taxable. This inference is only partially true. The instruction should have pointed out that if

the jury found an increase in net worth resulted from taxable transactions of the business of the Defendant and also did not find that the increase in net worth resulted from nontaxable acquisition of property, only then could it be inferred that such income is taxable.

In other words, the fact that the jury could have found that the increase in net worth, if it found any to exist, was the result of nontaxable gain, was a legitimate inference which could have been drawn by the jury in the Defendant's favor. The failure of the court in instructing the jury as to available inferences in the Defendant's favor while explicitly instructing them as to inferences to be drawn in favor of the Government renders this instruction, we think, likewise fatally defective under the explicit admonition regarding the use of the net worth method as expressed by the Supreme Court in the *Holland* case.

The cumulative effect of Instructions No. 26 and 27, as given by the court, is such as to amount to an instruction that only one inference is actually possible from proof of increased net worth, namely, that it was taxable income. This, we respectfully submit, fails to substantially meet the requirements of an adequate instruction on the net worth theory. It has been clearly established by the Supreme Court in the *Holland* case, *supra*, that a requisite to the use of the net worth method is the presence of competent evidence supporting the inference that the Defendant's net worth increases are attributable to current taxable income.

Increases in net worth standing alone cannot be assumed to be attributable to currently taxable income. *Holland v. United States*, *supra*. It is respectfully submitted that the Defendant was entitled to an instruction to this effect,

and that a careful reading of all of the instructions given to the jury does not supply this missing charge.

Likewise, the court should have instructed the jury that in using the net worth theory of proof, the jury should first find from proof beyond a reasonable doubt that an increase in net worth actually occurred. If they do not so find, then the Defendant should be acquitted. Secondly, if they do find that there was an increase in the Defendant's net worth in the given year, they must find beyond a reasonable doubt that the increase was taxable income. If they do not find the increase was taxable income, they should acquit the Defendant. In the instruction given as to the cash expenditure method [Instruction No. 25, Tr. R. p. 335], the court used this correct method of instructing the jury. It was not used, however, as to the net worth method.

Since both the net worth method and the cash expenditure method were used in this case by the Government, it cannot be ascertained which theory the jury relied upon in returning the verdict of "guilty". And, further, it cannot be said the same result would have followed had the jury been correctly instructed as to the net worth theory.

**E. The Court Failed to Instruct the Jury as to the
"Adequacy of the Defendant's Books."**

The instructions are further defective for the reason that the basis of the use of the net worth method or other form of proof is that the Defendant's books are inadequate or incorrect. This recognized by the statement in Instruction No. 26 to the effect that "The Government

is authorized by law if the books of the taxpayer are found to be inadequate to adopt a reasonable method of ascertaining income.” Again in Instruction No. 30, reference is made to where a taxpayer’s records are inadequate or inaccurate in substantial respect. A careful reading of all of the instructions given in this case, however, fails to disclose a definition of what constitutes “inadequate or inaccurate books or records”. Likewise, no definition is found of the term “substantial respect”. It is respectfully submitted that the very use of the net worth method or the bank deposit and cash expenditure method is dependent upon a finding by the jury that the taxpayer’s records were in fact inadequate or inaccurate in substantial respect within a defined meaning of such terms. Here, no such definition was given the jury and no such instruction requiring the jury to find such inadequacy or inaccuracy in the taxpayer’s books or records as a condition precedent to the use of the net worth method was given. This represents, we think, further substantial error.

F. The Court Erred in Refusing to Give the Instructions Requested by the Defendant.

The court refused to give Defendant’s Instructions B and C [Tr. R. pp. 7-8]. The court noted that the reason for the refusal to give these instructions was that they were covered by Instructions 26 and 27. For the reasons set forth in the next preceding section, the Appellant respectfully submits that his Instructions B and C should have been given to the jury, and that the Instructions 26 and 27 do not substantially cover the matter set forth in Defendant’s Instructions B and C.

**G. The Cumulative Effect of All the Foregoing Errors
Constituted Substantial, Prejudicial and Reversible Error.**

The Appellant sincerely and respectfully urges that the cumulative effect of the foregoing errors in instructions to the jury constituted substantial, prejudicial and reversible error. The judgment should be reversed, we submit.

Irrespective of the quantum of proof adduced by the Government, the state of the record discloses that the Appellant in the trial court relied upon his presumption of innocence. The instructions to the jury should, therefore, we submit, be carefully scrutinized. Where several errors appear in the instructions, as we submit they did here, the question of the cumulative effect of numerous erroneous instructions should be considered. Appellant herein respectfully urges that had the jury been adequately instructed, a different judgment could well have resulted. The correction of any one of the numerous errors might have balanced the outcome in the Defendant's favor.

We cannot assume that the jury did not follow the court's instructions. Rather we must assume that the jury did follow the court's instructions. Where several instructions are erroneous, no one can tell which error tipped the scales. Any one of the errors may well have been the fatal one for the defendant.

II.

The Court Erred in Admitting in Evidence an Affidavit of the Defendant Referred to as "Government's Exhibit 32" [Tr. R. p. 209], and Without Corroboration It Cannot Be the Basis of the Judgment.

As part of the Government's case, an affidavit of the Defendant was introduced in evidence over the Defendant's objections [Tr. R. p. 209].

The exact theory under which the Government introduced this affidavit is not clear. It is assumed, however, that the affidavit was offered in the nature of an admission against interest by the Defendant to prove one element of the *corpus delicti*, namely, a source of unreported income. The Information covered the taxable years of 1948 and 1949. The Defendant was not accused of any income tax evasion for the year 1950. The affidavit of the Defendant contained an admission that the Defendant neglected to show all income on income tax returns during the calendar years 1948, 1949 and 1950, and that the source of the additional unreported income was gambling. The affidavit, we think, was inadmissible for the following reason: Since it made no attempt to allocate or segregate unreported lump sum income during the three years in question, it could have no substantial probative value to prove non-reported income for any particular year. If it is proof of receipt of any taxable income and unreported income for the years 1948 and 1949, how much should be allocated to those years and how much to 1950? Obviously, it could not be used by a trier of fact to support a

fact that any given amount of income was received in any specific year. If it cannot support such a fact, it is non-corroborative of any fact to be proved by the Government. It should, therefore, have been excluded.

Likewise, the affidavit cannot be said to have been corroborated by any competent evidence to support the same. Standing alone, it could not support a judgment of conviction. *Wiggins v. United States*, 64 F. 2d 950. Likewise, no *corpus delicti* has been established, and, therefore, the affidavit should have been excluded and cannot be the basis of the conviction. *Spriggs v. United States*, 198 F. 2d 782.

In the case of *Spriggs v. United States*, 198 F. 2d 782, this court reversed a conviction for tax evasion where the Government's proof also made use of the Defendant's admissions. In the *Spriggs* case, the court used the following language:

"Whether this evidence upon which the judgment below must stand or fall is to be regarded as a confession or as admissions or as extra-judicial statements is of no consequent here. Under any name they are insufficient to sustain the conviction for there has been no independent proof of any crime having been committed. We deem it unnecessary to decide whether the lower court erred as Appellant contends in admitting this testimony of certain government agents concerning statements made to them by Appellant. Even if the admissibility of such testimony be assumed, *arguendo*, the government case still falls far short of establishing the guilt of Appellant by the further evidence required by our decision in *Davena, Jr. vs. U. S.*"

The general rule that the accused may not be convicted on his own uncorroborated confession has been consistently recognized by the Supreme Court in the case of *Warszower v. United States*, 312 U. S. 342, *Isaacs v. United States*, 159 U. S. 487, as well as the case of *Smith v. United States*, 340 U. S. 147, 75 Sup. Ct. 194. The case of *Smith v. United States* applies the corroboration rule to admissions as well as confessions.

It was incumbent upon the Government in proof of its case to show a source of the Defendant's allegedly not reported income. This it sought to show was from gambling activity of the Defendant. The evidence, however, showed that the Defendant reported his gambling income on his tax returns [Tr. R. p. 138, Ex. D in evidence]. There is no evidence that this gambling income as reported was incorrect except for this affidavit. It is respectfully submitted that no competent evidence was admitted to either establish the *corpus delicti* or the offense without resort to Defendant's affidavit. Aside from the Defendant's affidavit, there would be no competent evidence in the record that the Defendant received any taxable income from his gambling activity over or above that amount which he reported on his tax return. The books and records of the Defendant as they reflected his income from his established businesses were not shown to be inaccurate or erroneous. In short, the entire Government's case stood upon proof of an outside source of income of the Defendant. Without the Defendant's Affidavit, no *corpus delicti* was established. It is, therefore, submitted

that the conviction should not be permitted to stand upon this extra judicial statement of the Appellant.

The reported cases are not in agreement as to the extent or degree of the corroboration required. *Mangum v. United States*, 289 Fed. 213; *Aplin v. United States*, 41 F. 2d 945; *Daeche v. United States*, 250 Fed. 566. While this circuit has stated that evidence corroborating a confession of a defendant need not independently prove the commission of the crime charged neither beyond a reasonable doubt nor by a preponderance of the proof, *Davena, Jr. v. United States*, 198 F. 2d 230, still some corroboration is required and the quantum required is a matter of law. See, also, *Spriggs v. United States*, 198 F. 2d 782.

Conclusion.

It is, therefore, respectfully submitted that for the foregoing reasons the judgment of conviction should be reversed.

Respectfully submitted,

MAURICE J. HINDIN,

Attorney for Appellant.